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THE SMALL BUSINESS SUBCONTRACTING TRANSPARENCY ACT OF 2015

DECEMBER 20, 2016.—Ordered to be printed

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December 9), 2016

Mr. VITTER, from the Committee on Small Business and
Entrepreneurship, submitted the following

R E P O R T

[To accompany S. 2138]

The Committee on Small Business and Entrepreneurship, to which was referred the bill (S. 2138) to amend the Small Business Act to improve the review and acceptance of subcontracting plans, and for other purposes, having considered the same, reports favorably thereon, with amendments, and recommends that the bill, as amended, do pass.

I. INTRODUCTION

The Small Business Subcontracting Transparency Act of 2015 (S. 2138) was introduced by Senator Vitter on October 6, 2015.

During the markup of the bill, S. 2138 was approved unanimously by voice vote.

II. HISTORY (PURPOSE & NEED FOR LEGISLATION)

Under current law, a contract awarded to an other-than-small business for more than \$700,000 (\$1.5 million for construction) must include a subcontracting plan. These plans must enumerate opportunities for small businesses to participate as subcontractors, and must assign both percentage and dollar value goals. If an other-than-small business fails to make a good faith effort to comply with the subcontracting plan, the government must collect liquidated damages from the contractor. However, the Small Business Administration's (SBA) broad definition of "good faith efforts"

makes it difficult for a contracting officer to issue a notice that a large prime contractor has failed to make a good faith effort to comply with its subcontracting plan. Additionally, if a notice is issued, the threat of liquidated damages is empty for many prime contractors. In nearly 30 years, there are no records of a company paying these damages.

GAO has repeatedly found that agencies are failing to discover whether contractors are meeting their obligations under their subcontracting plans, even on high profile contracts. In fact, agencies are failing to ensure that the required subcontracting reports are even filed. Instead, the House Small Business Committee received reports that prime contractors ensured a finding of good faith by sponsoring agency small business conferences—writing checks to agencies rather than writing subcontracts to small businesses. As a result, small businesses struggle to receive subcontracting opportunities. Without these plans, Congress and small businesses do not possess the data they need to discern whether the statutory and administrative goals are being met. Under these conditions, agencies will continue to take credit for vastly inflated subcontracting numbers.

In a 2011 report, GAO reported that the greatest challenge to the program's effectiveness was the Procurement Center Representatives' (PCR) and Commercial Market Representatives' (CMR) lack of authority to influence subcontracting. PCRs told GAO that they had no means to dispute agency procurements if contracting officers did not use their recommendations on subcontracting plans. PCRs and CMRs also said it was difficult to enforce prime contractor performance under subcontracting plans because determining that a contractor was not acting in good faith was difficult. GAO recommended that the statute be modified to allow PCRs to challenge contracts when the PCRs' subcontracting recommendations were not adopted. This recommendation will require the contracting officer to listen to the PCR on subcontracting, and will serve to increase subcontracting goals and opportunities for small businesses.

III. HEARINGS & ROUNDTABLES

In the 114th Congress:

On October 6, 2015, the House Small Business Committee held a subcommittee hearing entitled, "Subpar Subcontracting: Challenges for Small Business Contractors." The subcommittee heard testimonies from the SBA, the Acting Inspector General for the U.S. Department of Interior, Woman Impacting Public Policy, the National Defense Industrial Association, and the Association of General Contractors. The hearing addressed the challenges small businesses face with subcontracting, both when the small business is the prime contractor and when it is the subcontractor. Specifically, the Subcommittee looked at three issues: problems with laws intended to prevent pass-through contracts, the issue of large prime contractors not fulfilling their subcontracting plans, and problems with the systems designed to track subcontracting.

IV. DESCRIPTION OF BILL

The bill requires the SBA to provide examples of activities that would be considered bad faith, as opposed to defining good faith,

so that contracting agencies and the SBA have concrete grounds to challenge contractor compliance for subcontracting plans. The bill provides clear direction on what should be considered a failure to act in good faith by prime contractors. Specifically, it states that by failing to file the necessary subcontracting reports, the contractor is in breach of contract. Additionally, this bill provides authority for a PCR or CMR to assess whether a proposed subcontracting plan provides the maximum practicable opportunity for small business concerns to participate. If the PCR or CMR believes that the plan does not provide sufficient opportunities for small business participation, the PCR or CMR is permitted to delay acceptance of the subcontracting plan for up to 30 days. However, if the PCR or CMR fails to reach an agreement with the contracting agency's personnel on a plan to provide the maximum practicable opportunity; the bill provides that the disagreement shall be decided by the head of the contracting agency.

V. COMMITTEE VOTE

In compliance with rule XXVI(7)(b) of the Standing Rules of the Senate, the following vote was recorded on October 7, 2015.

A motion to adopt the Small Business Subcontracting Transparency Act, a bill to improve the review and acceptance of subcontracting plans, was approved unanimously by voice vote with the following Senators present: Vitter, Scott, Fischer, Gardner, Ernst, Enzi, Shaheen, Cantwell, Cardin, Booker, Hirono, and Peters.

VI. COST ESTIMATE

In compliance with rule XXVI(11)(a)(1) of the Standing Rules of the Senate, the Committee estimates the cost of the legislation will be equal to the amounts discussed in the following letter from the Congressional Budget Office:

OCTOBER 24, 2016.

Hon. DAVID VITTER,
Chairman, Committee on Small Business and Entrepreneurship,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2138, the Small Business Subcontracting Transparency Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Stephen Rabent.

Sincerely,

KEITH HALL.

Enclosure.

S. 2138—Small Business Subcontracting Transparency Act of 2015

S. 2138 would authorize Small Business Administration (SBA) employees that review federal contracts to delay the acceptance of a subcontracting plan for up to 30 days if the plan fails to maximize the participation of small businesses. The bill also would require the SBA to issue regulations that provide guidance on how to comply with the requirement to maximize small business participation. CBO estimates that implementing S. 2138 would cost the SBA and other federal agencies \$11 million over the 2017–2021 pe-

riod. Such spending would be subject to the availability of appropriated funds.

Based on an analysis of information from the SBA about the current review process for subcontracting plans, CBO estimates that implementing S. 2138 would require up to 18 additional SBA employees to undertake additional reviews of subcontracting plans from other federal agencies. After federal agencies have worked with the new review process for a few years, CBO expects the cost of implementing those reviews would decline significantly as agencies better accommodate small businesses into their subcontracting plans. CBO estimates that the additional work would cost \$5 million over the 2017–2021 period.

Implementing S. 2138 would require federal agencies to address weaknesses in subcontracting plans that could be subject to the proposed delays. On the basis of information from the SBA and the General Services Administration (GSA), CBO estimates that it would cost each of the 26 major federal agencies about \$100,000 a year or a total of about \$6 million over the 2017–2021 period to conduct more detailed reviews of subcontracting plans. CBO estimates that this spending would occur mainly in the first two years because the majority of delays and reviews would probably occur as contracting officers adapt to the new SBA standards.

Enacting S. 2138 may change the behavior of contracting officers by encouraging them to select subcontracting plans they believe would be less likely to be subject to a delay imposed by the SBA. Those plans might have a higher or lower cost to the federal government than the plans they otherwise would select under current law. In 2015, the federal government spent \$440 billion on contract awards. The costs or savings of selecting different contracts as a result of implementing S. 2138 could be substantial; however, CBO has no basis for estimating any such effects.

Because the new subcontracting rules would affect agencies whose spending does not depend on annual appropriations, enacting S. 2138 would affect direct spending; therefore, pay-as-you-go procedures apply. Because most of those agencies can adjust the amounts they collect as operating costs change, CBO estimates that the net effect of any such spending by those agencies would be negligible. Enacting S. 2138 would not affect revenues.

CBO estimates that enacting S. 2138 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2026.

S. 2138 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Stephen Rabent. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VII. EVALUATION OF REGULATORY IMPACT

In compliance with rule XXVI(11)(b) of the Standing Rules of the Senate, it is the opinion of the Committee that no significant additional regulatory impact will be incurred in carrying out the provisions of this legislation. There will be no additional impact on the personal privacy of companies or individuals who utilize the services provided.

VIII. SECTION-BY-SECTION ANALYSIS

Section 1. Title

This Act may be cited as the “Small Business Subcontracting Transparency Act of 2015.”

Section 2. Good faith compliance

Currently, the Small Business Act provides that any contractor or subcontractor which fails to award small business subcontracts to the fullest extent consistent with the efficient performance of a contract, fails to cooperate in any studies or surveys as may be conducted by the SBA or relevant procuring agency, or fails to comply with its subcontracting plan shall be considered in material breach of contract and such breach may be considered in any past performance evaluation of the contractor.

This provision adds that it will be considered material breach of contract if a contractor fails to submit required periodic reports or cooperate in any studies or surveys as may be required by the Federal agency or the SBA in order to determine the extent of compliance by the offeror or bidder with the relevant subcontracting plan.

Section 3. Transparency in subcontracting goals

Under current law, the SBA is authorized to review procuring agencies’ solicitations to determine the maximum practicable opportunity for small business concerns to participate as subcontractors in the performance of the contract resulting from the solicitation, and to submit advisory findings to the appropriate procuring agency.

This provision removes the requirement that the Administration’s reported findings be treated as advisory in nature.

Section 4. Improving subcontracting plans

This subsection provides authority for a PCR or CMR to assess whether a proposed subcontracting plan provides the maximum practicable opportunity for small business concerns to participate. If the PCR or CMR believes that the plan does not provide sufficient opportunities for small business participation, the PCR or CMR is permitted to delay acceptance of the subcontracting plan for up to 30 days. However, if the PCR or CMR fails to reach an agreement with the contracting agency’s personnel on a plan to provide the maximum practicable opportunity; this subsection provides that the disagreement shall be decided by the head of the contracting agency.

In a 2011 Report,¹ GAO cited the PCRs’ and CMRs’ lack of authority to influence subcontracting opportunities as one of the greatest challenges to the effectiveness of the program. PCRs told GAO that they had no means to dispute agency procurements if contracting officers did not use their recommendations on subcontracting plans. PCRs and CMRs also said it was difficult to enforce prime contractor performance under subcontracting plans because determining that a contractor was not acting in good faith was difficult. GAO recommended that statute be modified to allow PCRs

¹ GAO-11-549R, *Improvements Needed to Help Ensure Reliability of SBA’s Performance Data on Procurement Center Representatives*.

to challenge contracts when the PCRs' subcontracting recommendations were not adopted. This recommendation would force the contracting officer to listen to the PCR on subcontracting, and serve to increase subcontracting goals and opportunities for small businesses.

Section 5. Defining good faith compliance

This provision requires SBA's Administrator to issue regulations providing examples of activities that would be considered a failure to make a good faith effort to comply with a contractor's subcontracting plan.

Currently, the Federal Acquisition Regulations (FAR) require that a contracting officer examine the totality of a contractor's actions in determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan. The FAR acknowledges that a contractor can make diligent efforts to identify and solicit offers from small businesses and fail to achieve its subcontracting goals. As such, the FAR provides the following examples of actions which may be considered as indicators of a failure to make a good faith effort: a failure to attempt to identify, contact, solicit, or consider for contract award small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business or women-owned small business concerns; a failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan; a failure to submit the relevant subcontract reports; a failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan; and the adoption of company policies or procedures that have as their objectives the frustration of the objectives of the plan.

SBA's regulations provide that a prime contractor can demonstrate that it has made a good faith effort in one of three ways: (1) by meeting its goals; (2) by overachieving in some categories to make up for an underachievement in other categories; or (3) by performing one or more of the following actions²:

- i. Breaking out contract work items into economically feasible units, as appropriate, to facilitate small business participation;
- ii. Conducting market research to identify small business subcontractors and suppliers through all reasonable means, such as performing on-line searches on the System for Award Management (SAM), posting Notices of Sources Sought and/or Requests for Proposal on SBA's SUB-Net, participating in Business Matchmaking events, and attending pre-bid conferences;
- iii. Soliciting small business concerns as early in the acquisition process as practicable to allow them sufficient time to submit a timely offer for the subcontract;
- iv. Providing interested small businesses with adequate and timely information about the plans, specifications, and requirements for performance of the prime contract to assist them in submitting a timely offer for the subcontract;

² 13 C.F.R. § 125.3(d).

- v. Negotiating in good faith with interested small businesses;
- vi. Directing small businesses that need additional assistance to SBA;
- vii. Assisting interested small businesses in obtaining bonding, lines of credit, required insurance, necessary equipment, supplies, materials, or services;
- viii. Utilizing the available services of small business associations; local, state, and Federal small business assistance offices; and other organizations;
- ix. Participating in a formal mentor-protégé program with one or more small-business protégés that results in developmental assistance to the protégés.

This broad list makes it difficult for a contracting officer to issue a notice that a large prime contractor has failed to make a good faith effort to comply with its subcontracting plan. However, if such notice is issued, the contracting officer is then responsible for “[i]nitiating action to assess liquidated damages.”³

The threat of liquidated damages is empty for many prime contractors. In nearly 30 years, there is no record of any company paying these damages.

By requiring the SBA to provide examples of bad faith, as opposed to defining good faith, contracting agencies and the SBA would have concrete grounds to challenge contractor compliance with their subcontracting plans.

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³ 48 C.F.R. § 19.705–6(f).